

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 05-44481-rdd

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5 In the Matter of:

6 DPH HOLDINGS CORP, et al. and DIP HOLDCO, LLP d/b/a

7 DELPHI AUTOMOTIVE, LLP,

8 Debtors.

9 - - - - - x

10 Adversary No. 07-02236-rdd

11 In the Matter of:

12 DELPHI CORPORATION, ET AL.

13 V.

14 DSSI, et al.

15 - - - - - x

16 United States Bankruptcy Court

17 One Bowling Green

18 New York, New York

19 May 24, 2012

20 10:13 a.m.

21

22 B E F O R E :

23 HON ROBERT D. DRAIN

24 U.S. BANKRUPTCY JUDGE

25 ECR OPERATOR: LONNIE WEBB

1 Notice of Agenda Proposed by Fifty-Fourth Claims Hearing  
2 Agenda

3  
4 Sufficiency Hearing Regarding Proofs of Claim Numbers 15514,  
5 15525 and 15526

6  
7 Notice of Agenda Proposed Seventy-Sixth Omnibus Hearing  
8 Agenda

9  
10 Motion by James Sumpter Regarding Extending Disability  
11 Benefits for Salaried Employees and Salaried Retirees -  
12 Vesting Motion Regarding Extending Disability Benefits for  
13 Salaried Employees and Salaried Retirees

14  
15 Motion by James Sumpter for Preliminary Injunction Regarding  
16 Salaried Disability - Expedited Request for Preliminary  
17 Injunction to Prohibit DPHH from Terminating Salaried  
18 Disability Plan

19  
20 Motion by Ontario Specialty Contracting, Inc. for Allowance  
21 of an Administrative Claim Pursuant to 11 U.S.C.  
22 503(B) (1) (A), or in the Alternative, for Leave to File a  
23 Late Administrative Expense Claim Pursuant to Federal Rule  
24 of Bankruptcy Procedure 9006(b)

25

1 Motion by James Grail to Lift Stay

3 Motion to Dismiss Adversary Proceeding Motion of the DSSI

4 Defendants For An Order Denying Plaintiffs' Motion to Amend

5 the Complaint and, to the Extent Necessary, Dismissing the

6 Adversary Proceeding With Prejudice.

25 Transcribed by: Sherri L. Breach, CERT\*D-397

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23 RENU SHAW

24 DOUG VETTER

25

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 Okay. Good morning. In re: DPH Holdings.

4 MR. CHIAPPETTA: Yes. Good morning, Your Honor.

5 Louis Chiappetta of Skadden Arps on behalf of the  
6 reorganized debtors, here with my colleague, John Lyons. On  
7 the line is Nick Campanario, also of Skadden, Arps. Also  
8 here with me is Cyndi Haffey, Maria Caceres-Boneau and David  
9 DeVine of Butzel-Long, and Denon Rue (ph) is here on behalf  
10 of the company.

11 Your Honor, there are no contested matters for the  
12 scheduled fifty-fourth claims hearing. We resolved the one  
13 matter last night and a stipulation was sent to Your Honor.

14 THE COURT: That was with --

15 MR. CHIAPPETTA: One --

16 THE COURT: That was with Johnson Controls?

17 MR. CHIAPPETTA: Correct.

18 THE COURT: Right.

19 MR. CHIAPPETTA: One contested matter scheduled  
20 for the seventy-sixth omnibus hearing and one contested  
21 matter for the adversary hearing.

22 THE COURT: Okay.

23 MR. CHIAPPETTA: We filed proposed agendas for the  
24 seventy-sixth omnibus hearing and the fifty-fourth claims  
25 hearing at docket numbers 21890 and 21891, and with your

1 permission I would like to proceed with those.

2 THE COURT: That's fine.

3 MR. CHIAPPETTA: Okay.

4 So, as I said, we were able to resolve the one  
5 matter that was contested, Johnson Controls, Inc. regarding  
6 proof of claim numbers 15514, 15525 and 15526, and that  
7 stipulation was submitted to Your Honor -- Your Honor last  
8 night.

9 Just wanted to update you on the progress of the  
10 claims, Your Honor. We are down to seven prepetition claims  
11 out of over 20,000 claims that were filed in this case. We  
12 have 21 administrative claims. Out of the original 42  
13 debtors we've closed 30 of them, and there are three of the  
14 12 remaining that are ready to be closed. So we're making  
15 significant claims in the claims and I just wanted to --

16 THE COURT: Okay.

17 MR. CHIAPPETTA: -- let you know about that.

18 THE COURT: All right.

19 MR. CHIAPPETTA: I'm going to proceed with the  
20 seventy-sixth omnibus hearing.

21 There are three uncontested matters. Matters 1  
22 and 2 were the motions by James Sumpter filed at docket  
23 numbers 21860 and 21867. Those were resolved pursuant to  
24 the orders entered by Your Honor at docket numbers 21876 and  
25 21877.



1 THE COURT: Right.

2 MR. CHIAPPETTA: The last uncontested matter is  
3 the amended motion of James Grail at docket number 21682,  
4 and I want to update Your Honor on this matter.

5 We've mentioned this at several hearings before;  
6 that there's several parties to this stipulation. The  
7 reorganized debtors have been able to reach out and have  
8 conversations regarding the proposed stipulation with  
9 General Motors, the ACE Insurance Companies, the Michigan  
10 defendants, everyone except for Mr. Grail's attorney, Mr.  
11 Dowd (ph). We've made several phone calls. We've sent  
12 overnight versions of the stipulation to Mr. Dowd. We've --  
13 don't have a working email address for him, so we requested  
14 --

15 THE COURT: Because that's -- that's funny because  
16 I thought he was actually on board with the whole concept.  
17 He was one of the first people that was behind this idea of  
18 a stipulation.

19 MR. CHIAPPETTA: This is why we're -- we're asking  
20 Your Honor for guidance. We're --

21 THE COURT: Okay.

22 MR. CHIAPPETTA: -- we're trying to get Mr. Dowd  
23 to engage. He has not provided us with a working email  
24 address so we've been overnight mailing versions to him.

25 THE COURT: All right.

1 MR. CHIAPPETTA: At this point --

2 THE COURT: Well, have you mailed it to his  
3 office?

4 MR. CHIAPPETTA: Yes, we have.

5 THE COURT: And you haven't gotten any response?

6 MR. CHIAPPETTA: No response, followed up with  
7 phone calls days after the we've sent the proposed  
8 stipulation, and --

9 THE COURT: Have you reached out to Mr. Grail  
10 himself?

11 MR. CHIAPPETTA: We've not reached out to Mr.  
12 Grail --

13 THE COURT: I -- I know that you would be  
14 reluctant --

15 MR. CHIAPPETTA: -- himself.

16 THE COURT: -- to do that because he's represented  
17 by counsel.

18 MR. CHIAPPETTA: Exactly.

19 THE COURT: But if you can't reach counsel, which  
20 you're telling me, I -- I authorize you to do that. Maybe  
21 he knows where -- where Mr. Dowd is. And my other reaction  
22 to this is that if you still can't reach him in the  
23 relatively near future, you should, I think, settle, by  
24 notice of presentment, a copy of the stipulation and order  
25 and just take his name off of it. And this would resolve

1 it, and put it on notice to him and to Mr. Grail.

2 MR. CHIAPPETTA: I believe, Your Honor, that the  
3 Michigan defendants are on the line and may -- may have a  
4 response to that.

5 THE COURT: Okay.

6 MR. RATERINK: Yeah. Your Honor, Dennis Raterink  
7 here on behalf of the Michigan Funds Administration. Good  
8 morning.

9 THE COURT: Morning.

10 MS. PRZEKOP-SHAW: And I'm Susan Przekop-Shaw here  
11 on behalf of the Michigan Workers' Compensation Agency.  
12 Good morning.

13 THE COURT: Good morning.

14 MR. RATERINK: You know, as to the first issue,  
15 Judge, we just found out last night about the problems that  
16 have been going on in contacting Mr. Dowd. As we are in  
17 Michigan, we may have some better efforts. We do have some  
18 bit of a preexisting relationship with him and we can --

19 THE COURT: Okay.

20 MR. RATERINK: -- make attempts as well to --

21 THE COURT: No. That's great. I -- I'm glad  
22 you're doing that. I mean --

23 MR. RATERINK: Yeah.

24 THE COURT: -- the most -- the most preferable  
25 course would be to actually get a hold of him because I

1 don't think he'll be a problem since he, again, was behind  
2 this concept in the first place.

3 MR. RATERINK: Right. And we're not sure what the  
4 -- what the holdup has been on -- on -- in terms of contact  
5 from him. But we will make efforts to reach out to him as  
6 well.

7 THE COURT: Okay. Great.

8 MR. RATERINK: As to the stipulation, we just  
9 wanted to put -- put the Court on notice of a couple of  
10 things.

11 Number one, we're still having considerable  
12 difficulties, both mine and -- and my client and Susan's  
13 client regarding the concept of a stipulation. As Your  
14 Honor is well aware, we have been litigating issues  
15 regarding subject matter jurisdiction and sovereign immunity  
16 regarding Michigan's involvement, the workers' compensation  
17 system's interaction with this Court for -- for some time  
18 now. And we're very hesitant and reluctant to -- to engage  
19 in a stipulation which we don't feel is necessary to obtain  
20 the release that -- that's being sought by Mr. Dowd in this  
21 case.

22 What we were proposing, and were talking to  
23 counsel about last night, was the idea that apart from Mr.  
24 Dowd, most of the parties seem to have a general agreement  
25 as to about 70 cases that are -- that -- that we've narrowed

1 this down to. We think that we can simply contact the  
2 appropriate state officials, the chief magistrate of the  
3 board of magistrates who oversees these cases as well as the  
4 workers' comp agency director, give them guidance and say,  
5 you know, look, the parties -- the parties that are at issue  
6 here are in agreement on this and -- and all agree that the  
7 ACE proceedings, the ACE litigation is having no impact and  
8 should not be considered in terms of the ongoing litigation  
9 of those files.

10 We can tell you that in the research and  
11 investigation that we've done -- like I indicated, we've  
12 narrowed this down to 70 files -- we cannot identify any of  
13 them at this point that are being held up because of the ACE  
14 interaction issue. Fifty-five of the files are being -- are  
15 on a status that the workers' comp agency refers to as await  
16 other status, but they're in that status because of an issue  
17 involving General Motors in a coordination of benefits issue  
18 that's being litigated in -- in federal court in Michigan,  
19 completely separate and unrelated to the Delphi or ACE  
20 issues.

21 The other cases we have a listing of them.  
22 Several are -- are awaiting resolution because of what's  
23 called a CMS issue or where they're trying to take the  
24 Medicare systems interests into account. Four of the cases  
25 on the list have been completely settled out and redeemed.

1 Two are -- two are just erroneous, we believe, because they  
2 are non-Delphi employers, nothing in the automotive system  
3 or automotive area at all. Two do involve ACE as a listed  
4 party, so we -- we're trying to resolve that issue to make  
5 -- get them off of the list.

6 We find three cases only that are in active  
7 litigation and there's no indication that those three active  
8 files are actually being held up because of the ACE/Delphi  
9 litigation.

10 So we would propose to -- like we -- like we  
11 indicated, to just simply contact the appropriate state  
12 officials with this information so that everybody has all  
13 the same information and they can go forward and -- and Mr.  
14 Dowd, hopefully, should be happy with that, knowing that the  
15 ACE stay is having no effect on these cases.

16 THE COURT: Well, I -- I can't speak for the  
17 relevant hearing officers or the -- whoever you would be  
18 contacting, but I can tell you that if I were in their  
19 position I would be uncomfortable with just a -- a contact  
20 without something to back it up. I know this is Michigan  
21 and not Missouri, but I would say, show me.

22 (Laughter)

23 THE COURT: And so I -- you know, I -- again, I  
24 understand your -- fully the issue about jurisdiction, et  
25 cetera. But I thought the stipulation -- I mean, the whole

1 point of the stipulation was that it would -- it made it  
2 clear that it had no effect whatsoever on those arguments;  
3 that it was not going to in any way have any bearing on --  
4 on those issues.

5 I just think it -- it's -- it's a lot cleaner if  
6 you actually have an order that says this is -- this is  
7 fine. It doesn't violate any stay or anything like that,  
8 and the only hold up, I guess, is that people can't locate  
9 Mr. Dowd, but maybe -- I mean, hopefully we can or -- or you  
10 can or the debtors can over the next, you know, week or two.

11 But it would seem to me that -- that -- I mean,  
12 it's his motion, ultimately --

13 MR. RATERINK: Certainly.

14 THE COURT: The way to resolve it would be by this  
15 order, which could be done by a notice of presentment. And  
16 -- and if he's not able to sign it, then at least he -- you  
17 know, we -- we would -- or we could actually have it on for  
18 the next hearing date. I mean, we've been carrying his  
19 motion. We could just have it on for the next hearing date  
20 and propose that order as -- with enough time so that, you  
21 know, anyone could -- could object to it.

22 But maybe this is all moot because you'll be able  
23 to locate him. But I -- but I -- failing that, I think that  
24 -- that the alternative is probably the way to go.

25 MR. CHIAPPETTA: The only thing that would, we

1 would like to comment, Your Honor, is without Mr. Dowd's  
2 signature, we don't have a way to bind the individuals that  
3 they will not implicate the policies going forward. That's  
4 something that we're concerned about, which is why without  
5 --

6 THE COURT: Well, he -- he purported to represent  
7 them as part of this motion, right?

8 MR. CHIAPPETTA: He did.

9 THE COURT: So we can -- I can issue that order as  
10 part of resolution of the motion. They're parties to the  
11 motion.

12 MR. RATERINK: Actually, then that -- that  
13 language, Your Honor -- this is Dennis Raterink again -- is  
14 part of the reason that -- that we have a -- at this point  
15 at least are unable to sign onto the stipulation as proposed  
16 because the order goes beyond simply a notice to the  
17 Michigan system and it attempts and purports to bind these  
18 claimants to a course of action that the Michigan  
19 administrative system would not require them to do.

20 THE COURT: But -- but they sought relief --

21 MR. RATERINK: And -- I'm sorry. Go ahead.

22 THE COURT: But they sought relief in the court.

23 MR. RATERINK: No. I understand, Your Honor. And  
24 in the protection, I think, though that's already there is  
25 the stay order. If they were to amend their claims and



1 change the dates of injury alleged, the Michigan Funds  
2 Administration, the insureds and -- and DPH attorneys are  
3 already under an obligation to this Court to come back and  
4 inform you if any cases are attempting to implicate the  
5 policies in question.

6 THE COURT: Right. But -- but didn't their --

7 MR. RATERINK: So --

8 THE COURT: I mean, but didn't their motion seek  
9 relief specifically for a finding that they -- that they  
10 could go ahead without implicating? I mean, this is -- this  
11 is the relief they wanted, so I --

12 MR. RATERINK: It does. And I think when you --  
13 and that's one of the things that we had proposed to be  
14 added to this stipulation if it was -- if it was going to be  
15 entered without our signature was that this is -- any  
16 indication that we can give to you and give to this Court as  
17 to the current status of these claims, it's just that. It's  
18 a snapshot. It's the way these cases are being addressed  
19 right now because of what's being alleged in those claims.

20 But in the Michigan Administrative System, they --  
21 as I said, they have full freedom to amend an alleged  
22 different dates of injury at any time with no penalty. And  
23 by doing that, again, that could change this status. We can  
24 tell you that of those 70 files that only two of them  
25 implicate the ACE at this point, but that could change

1 tomorrow. That could change --

2 THE COURT: All right.

3 MR. RATERINK: -- next week.

4 THE COURT: Well, I haven't -- I haven't seen -- I  
5 haven't reviewed the proposed stipulation and order,  
6 obviously. But I was of the belief that it was -- it was  
7 proceeding ahead and that it would -- it was basically going  
8 to be ready to be executed.

9 But, you know, I think we should just actually put  
10 it on the calendar for the next -- next hearing so we can  
11 deal with it.

12 MR. CHIAPPETTA: Very well, Your Honor.

13 THE COURT: Okay.

14 MR. OLSHIN: Your Honor, this is Lou Olshin. I  
15 represent ACE, and hearing Mr. Raterink I was wondering if h  
16 would mind sharing with me the names of the 70 claimants  
17 that he apparently has identified as well as any other  
18 proposed changes to the stipulation which, to date, I have  
19 not seen.

20 But I would say, as Your Honor mentioned  
21 initially, that not having the Michigan defendants sign onto  
22 the stipulation does create a level of discomfort,  
23 particularly given what was just said; that if these cases  
24 moved forward, the claimants might be free to change dates  
25 of injury which would then implicate the ACE policies.

1 THE COURT: All right. Well, I -- I guess I find  
2 that hard to believe that Mr. Dowd has just vanished from  
3 the face of the earth. So why don't we -- why don't we --  
4 why don't you all put most of your effort in trying to find  
5 him.

6 MS. PRZEKOP-SHAW: Susan Przekop-Shaw, Your Honor.

7 Mr. Olshin just talked about the stipulation and  
8 we had acquired that from Nick Campanario and he also  
9 attached to that list the cases that he felt were subject to  
10 this particular motion. So I'm kind of surprised to hear  
11 that Mr. Olshin hasn't seen that list.

12 And we don't have any knowledge of any other  
13 stipulation than what was presented to us, and there really  
14 is no --

15 THE COURT: Okay.

16 MS. PRZEKOP-SHAW: -- protective language in  
17 there. So I think --

18 THE COURT: All right. So why don't you all just  
19 --

20 MS. PRZEKOP-SHAW: -- we need a little  
21 communication.

22 THE COURT: Why don't you all -- yeah. That's  
23 fine. Why don't you all just follow up on the -- on that  
24 offline?

25 MS. PRZEKOP-SHAW: Thank you.

1 THE COURT: Okay. Thanks.

2 MR. CHIAPPETTA: Thank you, Your Honor.

3 That takes us to the last matter on the -- that's  
4 listed on the seventy-sixth omnibus hearing agenda, which is  
5 the motion by Ontario Specialty Contracting for leave to  
6 file a late administrative claim.

7 This is Ontario's motion so with Your Honor's  
8 permission I'll cede the podium to opposing counsel to  
9 present their motion.

10 THE COURT: Okay. That's fine. Thank you.

11 MR. ORR: Good morning, Your Honor. Thank you.

12 Patrick Orr from Klestadt and Winters on behalf of Ontario  
13 Specialty Contracting, Incorporated.

14 Your Honor, I'm happy to report that I think we  
15 may have a way to get around what would be otherwise a  
16 contested hearing this morning. In order to do that, I  
17 think it may make sense for me to briefly give you some  
18 background as to some of the events that occurred between  
19 the filing of the papers that Your Honor may have already  
20 seen and today, really within the last week or so.

21 The claim arises from a purchase order that was  
22 issued by the debtor after a request for quotes that was  
23 issued to Ontario Specialty. The purchase order sought  
24 Ontario's services with respect to a plant in Rochester  
25 where Ontario would come in, remove and demolish the inside

1 of the plant, take all the scrap out of it, and due to the  
2 value of the scrap, at least the anticipated value of the  
3 scrap at the time of the contract, my client would actually  
4 pay the debtor to do the demolition work in exchange for the  
5 value of the scrap.

6 That purchase order was issued on July 24th of  
7 2008. During the course of the next year, as work continued  
8 at this Rochester facility, the amount of asbestos that  
9 needed to be removed from the facility was much greater than  
10 what the parties anticipated. The purchase order itself  
11 provides that to the extent the work is greater or more  
12 elaborate than what was contemplated, the parties would  
13 agree to agree to an adjustment to the contract terms.

14 During the course of the year discussions ensued.  
15 Ultimately, the debtor commenced a lawsuit in Eerie County,  
16 New York against my client. That lawsuit was commenced on  
17 August 28th of 2009.

18 Your Honor, that action is still pending and on  
19 May 15th, last week, the plaintiff in that action, which was  
20 previously the debtor, filed an amended complaint seeking to  
21 replace Delphi with GM components as the plaintiff in the  
22 case.

23 At that point my client's local counsel in New  
24 York engaged with GM Components' counsel in New York, and  
25 earlier this week we were given a -- an email was sent to

1 our -- our local counsel indicating that GM Components would  
2 be willing to enter into a stipulation in -- in the Erie  
3 County court which essentially says that all liability  
4 arising from the underlying cause of action related to  
5 assets and liabilities that were assumed by GM Components in  
6 connection with a transaction that took place in this court.

7 As of today we're told that that attorney is  
8 drafting a stipulation. We're hoping to get that within the  
9 Next week. Assuming it says what they say it will say, we  
10 would be -- we think that that would resolve all issues in  
11 -- in this court.

12 THE COURT: Maybe you wouldn't have a claim  
13 anymore in this court?

14 MR. OLSHIN: Exactly. We would be comfortable  
15 that we would be able to recover to the extent that we -- we  
16 -- we are ultimately successful in that litigation or it is  
17 -- or it settles, if the plaintiff in that litigation, who  
18 is not a debtor in this court, is willing to stipulate to  
19 that, then we're okay. We would withdraw this motion --

20 THE COURT: Well, but -- but when you say the  
21 plaintiff you mean the new plaintiff, the --

22 MR. OLSHIN: The new plaintiff, GM Components.

23 THE COURT: Right.

24 MR. OLSHIN: That's right, Your Honor.

25 We approached the debtors' counsel with this

1 earlier this week, but they were unwilling to adjourn  
2 today's hearing on consent. So we thought it was wise to --  
3 to get you up to speed as to what happened in the last week  
4 or so.

5 THE COURT: Okay.

6 MR. LYONS: Good morning, Your Honor. J

7 THE COURT: Good morning.

8 MR. LYONS: John Lyons on behalf of DPH.

9 Your Honor, this claim, the DPH has the  
10 responsibility for administering claims that have been  
11 filed. You know, we understand that there's this -- this  
12 other state court action and GM Components, you know, may  
13 well be transferring in as a party for DPH.

14 As Your Honor has seen from the briefs, this claim  
15 is clearly, in our view, late. I mean, the face of the  
16 proof of claim says it arose prior to June 1, 2009. It's a  
17 fairly clear case. You know, again, when we -- when we had  
18 the request, we had already incurred the expense of filing  
19 the briefs. Mr. Chiappetta was already here in New York.  
20 Mr. Rue had already paid for his ticket, so we just don't  
21 see any --

22 THE COURT: Well, but it -- but on the other hand,  
23 if, in fact, it's not anymore a claim against any of the  
24 Delphi debtors because it's been a -- assumed by GM, I don't  
25 really have jurisdiction over it.

1 MR. LYONS: No. No. No. Your Honor, the way  
2 that it works under the plan is we still have the obligation  
3 to administer and object to claims. They may -- you know,  
4 they were assigned to GM Components under the plan.

5 THE COURT: Right.

6 MR. LYONS: But -- but DPH still has the  
7 responsibility to administer the claims --

8 THE COURT: That's part of the --

9 MR. LYONS: -- that were filed in this case.

10 THE COURT: That's part of the GM deal?

11 MR. LYONS: Yes. That's part of the -- of the  
12 MDA.

13 And, Your Honor, you know, frankly, they can -- if  
14 they want to work out whatever deal they want outside of the  
15 plan and in their business relationship, that doesn't  
16 concern DPH. But we still have a proof of claim here that's  
17 on file through this estate, through this plan that --

18 THE COURT: Well --

19 MR. LYONS: -- that, you know, in our view, again,  
20 was clearly late.

21 THE COURT: But can the estate bear any  
22 responsibility to GM for not objecting to this type of  
23 claim?

24 MR. LYONS: Well, Your Honor, the duty is on DPH  
25 to object to claims that have been filed on the register, so



1 --

2 THE COURT: Under the MDA?

3 MR. LYONS: Under the MDA. So -- so we have the  
4 duty to -- and we have the duty to clean-up the claims  
5 register before --

6 THE COURT: So --

7 MR. LYONS: -- we close the case.

8 THE COURT: Well, but -- but -- I mean, that's a  
9 separate point because counsel said that there's a  
10 reasonably good chance that the register will be cleaned up  
11 by the GM entity stating that it assumes full responsibility  
12 for the claim.

13 MR. LYONS: And, Your Honor, we have had no  
14 conversations with GM Components. I -- as I said I don't  
15 doubt in any way what counsel is saying, but -- but, you  
16 know, again, we're -- we're ready to go now. We think it's  
17 an easy call and, you know, perhaps Your Honor could  
18 provisionally rule and if they want to withdraw it before  
19 Your Honor enters the decision, but then we won't have to  
20 come back here again if something falls apart between GM  
21 Components and --

22 THE COURT: All right.

23 MR. LYONS: -- and Ontario.

24 THE COURT: Okay. Well, that's fair. I mean, I  
25 -- not only the parties, but I've spent a fair amount of

1 time preparing for this.

2 MR. ORR: Your Honor, if -- if I may, you know, I  
3 -- I kind of cut to the chase with respect to what's  
4 happened in the last week. We --

5 THE COURT: Right.

6 MR. ORR: -- we disagree that it's an easy call.

7 THE COURT: No. I -- I understand that. I'm just  
8 -- I understand that. We're not getting into the merits  
9 yet. I'm just trying to --

10 MR. ORR: I mean, Your Honor, we're not asking --

11 THE COURT: Do you have any -- anything in writing  
12 for me to look at?

13 MR. ORR: I can present you with an email that we  
14 received from -- from GM Components' counsel and -- and  
15 Rochester.

16 THE COURT: Okay. Let me take a look at that.

17 MR. ORR: Sure.

18 (Pause)

19 MR. LYONS: Does counsel have a copy of that or I  
20 -- I'm happy to --

21 MR. ORR: I'm sorry. I don't have an extra copy.

22 MR. LYONS: Okay. Your Honor, well --

23 (Pause)

24 THE COURT: Well, I mean, this really goes to -- I  
25 mean, I'll show it to Mr. Lyons. But it appears to me that

1 this email really goes to who's the proper party in the  
2 state court litigation, not -- not whether GM, in fact,  
3 absolves Delphi of its responsibility to deal with the claim  
4 in the bankruptcy case. And I didn't -- the one aspect of  
5 this -- you can give that to Mr. Lyons if you want.

6 The one aspect of preparing for this hearing that  
7 I didn't spend a whole lot of time on was the state court  
8 complaint, but my impression was that that was largely  
9 separate and apart from this claim objection. I mean,  
10 otherwise the parties would have said, I should have  
11 abstained or something, you know, to -- to defer to the  
12 state court. It just seems to me that he's not really  
13 saying that; that Delphi doesn't have to do anything in this  
14 -- in this litigation. In fact, I'm not sure he even knows  
15 about this claim objection.

16 MR. ORR: Your Honor, I -- I agree that -- you  
17 know, our -- our hope was that through the -- once we  
18 received a draft of the stipulation it would be reworked  
19 through various iterations and it would be something that we  
20 could live with.

21 If it is, as I said earlier, then we would  
22 withdraw our administrative claim in this case and the  
23 motion compelling payment and then we're done. If it does  
24 not, then we can come back in and have a hearing on this. I  
25 think there's enough facts raised by both of the pleadings

1 that it's not as clear a case as -- as the debtors' counsel  
2 would have it.

3 Certainly, the work occurred during a certain  
4 period --

5 THE COURT: Well, that's -- that's a separate  
6 issue. I mean, I -- I'm just -- I don't want to get into  
7 the merits. I wouldn't be putting this off because it's  
8 difficult -- if it was difficult or -- or deciding it  
9 because it's easy. If someone else is willing to pay your  
10 client for it, that's -- you know, that's fine.

11 Would your client be prepared to pay the costs of  
12 these people coming out here for this hearing to put it off?

13 MR. ORR: No. I -- no, Your Honor, because we  
14 contacted them earlier this week and said that we were -- we  
15 were prepared to adjourn the hearing for a brief period of  
16 time to resolve this. So, you know, we would have preferred  
17 to have not come today. We're here at the debtors' behalf.

18 THE COURT: Well, there was no request to adjourn  
19 it to me.

20 MR. ORR: Our -- our understanding, Your Honor,  
21 was that if it wasn't on consent, we were expected to be  
22 here today. And --

23 THE COURT: Well, you could have asked for an  
24 adjournment.

25 MR. LYONS: And, you know, Your Honor, also, we

1 had already incurred a lot of the costs. You know, I mean,  
2 again, it's the motion that we filed --

3 THE COURT: Well, this can -- this came up at the  
4 last minute so that's -- that's a separate --

5 MR. LYONS: Right.

6 THE COURT: -- that's a separate point. I mean,  
7 you're never going to get those costs back one way or the  
8 other.

9 MR. LYONS: I mean, one other option, Your Honor,  
10 is -- is perhaps both parties could waive any further  
11 argument. Your Honor could decide on the papers if they  
12 don't, you know, file a notice of withdrawal so we don't  
13 have to come back, and you could just, you know, decide on  
14 the papers.

15 I think Your Honor is pretty -- I mean, again, I  
16 -- again, we've had a number of late claims with Your Honor  
17 and -- and this one I think is -- is pretty straightforward.

18 THE COURT: All right. This is what I'll do. I  
19 will -- I will hear argument today. I'll give you my  
20 preliminary ruling. If -- if you're able to memorialize a  
21 stipulation with the GM entity that -- where they take on  
22 responsibility, then -- you know, within 30 days then the  
23 ruling will just stay preliminary and of no force or effect.  
24 If you're not able to do that, then it will become my final  
25 ruling.

1 MR. ORR: Very good, Your Honor.

2 THE COURT: Okay.

3 MR. ORR: With respect to -- with respect to  
4 arguments, I -- you know, there's -- our papers, there have  
5 been a -- several iterations of papers filed before the  
6 Court. I think that the point that I would impress upon the  
7 Court in considering the motion and the administrative claim  
8 itself is that the debtor seems to be focusing on -- on the  
9 fact that certain work occurred during a certain period of  
10 time.

11 The fact remains that this initially was a  
12 contract that contemplated my client paying the debtor. As  
13 -- as the magnitude of the asbestos that was located in this  
14 Rochester facility became aware to the parties that there  
15 was more work that needed to be done to remove the asbestos  
16 and as the market for scrap continued to decline through  
17 2008, things shifted. So it's not so much just an analysis  
18 of -- of when the work occurred, but it was the market --  
19 market forces that were impacting what my client would  
20 ultimately be able to recover under the contract.

21 It's not as clear cut. It's just the debtor  
22 taking a statement from our papers that the services were  
23 rendered during a certain date. I think things are a little  
24 bit more in play than that, and I think that it wasn't until  
25 the parties got together in September of 2009, went into a

1 room and came out of a room that -- that the debtors'  
2 position at that time was we're not paying, and my client's  
3 position was, you need to pay, that we felt the claim had  
4 fully matured.

5 THE COURT: Well --

6 MR. ORR: But you --

7 THE COURT: -- I don't understand that since the  
8 May 27th, 2009 letter says Delphi's offer is unacceptable.  
9 And that's the fourth letter laying out this claim dispute.  
10 It's all pre-June 1.

11 MR. ORR: There -- there certainly were settlement  
12 discussions, Your Honor. My client's view as that until  
13 those negotiations had -- had terminated and it became clear  
14 that this was going to litigation, it was at that point that  
15 they felt that the claim had matured.

16 THE COURT: Well, but --

17 MR. ORR: It just so happens that the notice of  
18 bar date -- the October notice of bar date for 2009 came  
19 several weeks -- several weeks after that, which prompted  
20 them to then file the administrative claim in advance of  
21 what they thought was the bar date. But certainly September  
22 of 2009 is well after July 15th of 2009.

23 THE COURT: Well, let -- let me just posit a  
24 hypothetical with you.

25 Party X has a contract with Party Y. Party Y

1 breaches the contract, but the parties engage in settlement  
2 discussions. When does the claim arise; would those  
3 settlement discussions finish or when Party Y breaches the  
4 contract?

5 MR. ORR: Your Honor, it's -- it depends on the  
6 facts, but, typically, it would be upon the breach of the  
7 contract.

8 THE COURT: So, I mean, that's what's being  
9 alleged here, although, frankly, I -- I think that, as a  
10 separate matter, this -- this issue about delay is -- is  
11 nowhere apparent in the letters. The letters all talk about  
12 mutually mistaken belief that the scrap metal market  
13 wouldn't collapse and the economic affect of the scrap metal  
14 market. They were always willing to pay you for the  
15 asbestos and the -- you know, the -- basically \$50,000.

16 It's the -- it's the change in the market that  
17 they weren't particularly willing to pay for except to be  
18 maybe accommodating since it appears that there was no -- no  
19 harm to them for letting your client keep the scrap there  
20 hoping that the market would turn around within a certain  
21 period.

22 So it may well be that your client came up with  
23 this rationale after the fact. But it was alleging that it  
24 wanted to get out of the contract based on these facts  
25 starting in November of '08. November 3 '08 is the -- is



1 the first letter. And then there's one from April of '09,  
2 and then there's a Delphi response from May of '09, which is  
3 the proposal for dealing with the issues that OSC raises,  
4 and then there's the May 27th letter which says this is  
5 unacceptable.

6 So, I mean -- I mean, you -- it's pretty clear the  
7 dispute was in existence going back to '08, but in any  
8 event, it was a dispute that was not going to be resolved in  
9 -- before June of '09.

10 MR. ORR: Your Honor, it's -- I can't -- I can't  
11 contest any of the facts. The facts are what they are.  
12 Again, my client's good faith belief was that there was no  
13 need to file a claim until negotiations had terminated and  
14 they were headed to litigation.

15 THE COURT: Okay.

16 MR. ORR: You know, the -- those are the facts.  
17 The equities are such that this is a post-confirmation  
18 contract. There was an expectation that payment would occur  
19 in accordance with the contract without having to loop back  
20 through the bankruptcy court. Rightly or wrongly, those  
21 were the expectations and it was when they received the  
22 October notice of 2009 that they believed at the time, in an  
23 abundance of caution they were filing an administrative  
24 claim.

25 Now they're in a position where their ability to

1 collect on that claim -- we don't know how things are going  
2 to turn out with this stipulation in state court, but  
3 they're now in a lawsuit where --

4 THE COURT: What was different in October from --  
5 from May? Did they had -- they had one more meeting to try  
6 to resolve this dispute?

7 MR. ORR: Well, I -- I think -- yes, Your Honor.  
8 That's -- that's what my client would testify to. But what  
9 happened in October is that when they received the new bar  
10 date notice for the later bar date, they were now in a world  
11 that was -- it became very clear to them that they were not  
12 going to get paid on this contract --

13 THE COURT: Why?

14 MR. ORR: -- and that they were at a loss.

15 THE COURT: Why was it any different from before?

16 MR. ORR: Well, I think there was parties going to  
17 settlement discussions with the hope that an agreement would  
18 be reached.

19 THE COURT: But they were already in settlement  
20 discussions.

21 MR. ORR: But at -- by October of 2009, those  
22 discussions had terminated. There was no -- the hope was  
23 gone and litigation was eminent at that point.

24 THE COURT: Well, I mean, the May letter -- the  
25 May 27 letter says this offer is unacceptable. In the

1 absence of an agreement we will be forced to pursue legal  
2 proceedings and will seek to recover the full claim. It's  
3 pretty -- pretty definitive. They're certainly aware of a  
4 claim.

5 I mean, frankly, I'm not sure there is a claim for  
6 this anyway. I mean, it really does -- the whole point is -  
7 - is because the market collapsed that there's no guarantee  
8 of the market collapsing and the idea of there being delay  
9 appears nowhere in any of these letters as causing the  
10 market to collapse. They were aware of the market  
11 collapsing shortly after the contract started to be  
12 performed.

13 But that's, I guess, neither here nor there,  
14 although it may go to the merits of the pioneer aspect of  
15 this.

16 MR. ORR: I think that's -- I think that's right,  
17 Your Honor, and I think that those issues will ultimately be  
18 -- be resolved in the state court litigation. My concern is  
19 that we're litigating with -- with both arms tied behind our  
20 back and, you know, I understand that ultimately that may be  
21 my client's fault, but that's -- that's what will happen.

22 THE COURT: Okay.

23 All right.

24 MR. ORR: Thanks.

25 MR. LYONS: Just very briefly, Your Honor. I

1 mean, the face of the proof of claims that the date was  
2 incurred between August 4th, 2008 and May 2009, and in the  
3 responses they said the work was substantially complete by  
4 May 2009. So if you look at it from just goods and services  
5 type of benefit to the estate, all the stuff was done before  
6 the June 1 --

7 THE COURT: Well, but -- but the claim itself  
8 isn't really based on that. It's based upon, basically,  
9 50,000 change orders and another 400,000 because the market  
10 collapsed.

11 MR. LYONS: And that was before June 1, 2008.

12 THE COURT: And that was clearly before June 1.

13 MR. LYONS: Correct. So we hope, you know, just  
14 again, you know, we certainly discussed these factors with  
15 Your Honor in the past, but because it certainly was within  
16 the control which is the control of Ontario to file this  
17 claim for June 1 --

18 THE COURT: I mean, you're not -- you're not  
19 disputing the amount that actually was provided -- I mean,  
20 that -- that -- they didn't have to file a proof of claim  
21 for the amounts that were being paid in the ordinary course,  
22 right? It's just for this dispute that they had to file a  
23 proof of claim for?

24 MR. LYONS: If there was something that was due in  
25 the ordinary course after June 1, correct. But -- but,

1 again, Your Honor, this was all -- this controversy, this  
2 dispute was fully teed up. As -- you know, as discussed in  
3 the May 27 letter, there was a dispute and there was a --  
4 you know, and there was a live controversy between the  
5 parties that, again, would clearly have made that claim  
6 subject to the bar date.

7 THE COURT: Okay.

8 MR. LYONS: So other than that, Your Honor, we  
9 would just rest on our papers unless Your Honor has any  
10 questions.

11 THE COURT: Well, I did have one -- one question  
12 and it -- and it goes to -- to the May 11th letter, which  
13 was from Delphi's representative to Mr. Harton (ph) of  
14 Ontario Specialty Contracting. Paragraph 3 of that letter  
15 has three deductions and two additions to payments under the  
16 contract. It says, "Changes to payments due to Delphi for  
17 additional work will be deducted from payments owed to  
18 Delphi as outlined below." And it's -- it's reducing it by  
19 67,000 and change and then 42,000 which is part of the  
20 claim, the 42,0000, and then by \$73,115, which was also part  
21 of the claim. Those two components adding up to about  
22 \$9,000. And then there are a couple of additions.

23 So my question is what -- under the -- under the  
24 bar date order what is the status of that? Is it part of an  
25 integrated proposal and, therefore, not binding or do the

1 parties actually agree to this aspect of it and you're  
2 really just fighting about the scrap issue?

3 MR. LYONS: Your Honor, I'm -- again, we -- we  
4 really responded to the motion based up the timing of the  
5 accrual of the claim --

6 THE COURT: Right.

7 MR. LYONS: -- and didn't really get into the, you  
8 know, actual merits and dollars and sense. I mean, to be  
9 clear, Your Honor, if they have a defense. And this is --  
10 again, this is, you know, based upon Your Honor's ruling in  
11 Plymouth Rubber, you know, we're not taking away any defense  
12 they may have in that state court action for some of these  
13 deductions. We're just again seeking to -- to disallow the  
14 claim and an affirmative claim against the estate.

15 THE COURT: Okay.

16 MR. LYONS: So I don't know if that answers  
17 directly Your Honor's question, but I think it may -- it  
18 certainly will be clear to Ontario that they still have  
19 defense in the state court action. They just cannot seek  
20 affirmative recovery.

21 THE COURT: Okay. All right. I guess that's  
22 where I was coming out to; that -- that you propose  
23 deductions and seem to have agreed to them subject to some  
24 additions. But then looking at -- at the response, it  
25 doesn't really deal with those. It just deals with the

1 overall point on the -- on the market loss on the scrap  
2 metal prices. So --

3 THE COURT: Right. And Ontario's obviously free  
4 to talk to GM Components about any kind of set off or  
5 defense as they have in the state court action.

6 THE COURT: Right.

7 Okay. All right. Anything more?

8 (No verbal response)

9 THE COURT: Okay.

10 MR. ORR: Nothing from Ontario, Your Honor.

11 THE COURT: Okay. I have before me a motion by  
12 Ontario Specialty Contracting or OSC that seeks relief in  
13 the alternative. First, a determination that OSC is not  
14 bound by the June 16th, 2009 administrative expense bar date  
15 order entered by the Court that set a July 15th, 2009 bar  
16 date for administrative expense claims arising before June  
17 1st, 2009, which actually was subsequently amended to cover  
18 claims arising through a May 31st, 2009 by my order of July  
19 15th, 2009.

20 And, second, that even if that order does apply to  
21 the administrative expense claim, that OSC concededly did  
22 not file until October of 2009, i.e. late, that an order be  
23 issued deeming such claim -- which, again, was filed on  
24 October 30th, 2009, to be timely. Notwithstanding that it  
25 was filed after the May 31st, 2009 bar date.

1           The debtors have objected to the motion and I find  
2           and conclude that the debtors' objection should be granted.

3           With respect to OSC's first argument, OSC contends  
4           that its proof -- I'm sorry -- that its claim for an  
5           administrative expense, which it asserted in its  
6           administrative expense claim of October 30th, 2009, did not  
7           arise until after the May 31, 2009 period and, therefore, is  
8           not covered by the June 16th, 2009 bar date order.

9           The claim is based upon a provision in paragraph 3  
10          of the contract between the parties which states "Buyer" --  
11          that is, Delphi -- "may at any time require seller" -- that  
12          is OSC -- "to implement changes to the specifications or  
13          designs of the goods or to the scope of any services or work  
14          covered by this contract, including work related to  
15          inspection, testing, or quality control.

16          "While buyer will endeavor to discuss any such  
17          changes with seller as early as practical, seller will  
18          promptly implement such changes. Buyer will equitably  
19          determine any adjustment to price or delivery schedules  
20          resulting from such changes, including buyer's payment of  
21          reasonable costs necessary to implement such changes.

22          "In order to assist in the determination of any  
23          equitable adjustment in price or delivery schedules, seller  
24          will, as requested, provide information to buyer, including  
25          documentation of changes in seller's cost of production and



1 the time to implement such changes.

2 "In the event any disagreement arising out of such  
3 changes, buyer and seller will work to resolve the  
4 disagreement in good faith, provided, however, that seller  
5 will continue performing under this contract, including the  
6 manufacturing and delivery of goods and prompt  
7 implementation of changes required by buyer while buyer and  
8 seller resolve a disagreement arising out of such changes."

9 It's asserted in the proof of administrative  
10 expense claim that this provision was breached by Delphi in  
11 three ways and the motion reiterates that assertion.

12 First, it is asserted that Delphi learned with  
13 OSC, after the contract was entered into, that additional  
14 asbestos-containing materials beyond those projected by  
15 Delphi when the contract was entered into were discovered at  
16 the Rochester plant that was being demolished, which  
17 resulted in substantial extra costs;

18 Second, Delphi also requested additional utility  
19 and other work beyond the scope of work originally proposed;

20 Third, it is alleged that the underlying financial  
21 basis for much of the contract, i.e. the market price for  
22 scrap metal pursuant to which, on the net basis, OSC was  
23 paying Delphi for the right to demolish the Rochester plant  
24 and remove the scrap metal, changed so dramatically that the  
25 contract should be revised.

1           It's not clear to me at all that that last point  
2       would fit in to paragraph 3 that I've previously read,  
3       although it is asserted in the motion and in the claim that  
4       delays caused by Delphi resulted in the decreased recovery  
5       by OSC as a result of the steadily declining scrap metal  
6       price. I should note that although, as I'll note in a  
7       moment, the several communications by OSC to Delphi with  
8       respect to OSC's desire to renegotiate the contract all  
9       refer to the decline in scrap metal prices, none of those  
10      letters refer to that -- the harm to OSC being caused by  
11      such decline as having resulted from Delphi's delay in any  
12      way.

13           In any event, those are the three bases for the  
14      administrative expense claim, and that is the provision of  
15      the agreement pursuant to which the claim allegedly arises.  
16      Reading that provision, it appears to me that if, in fact,  
17      the condition for the equitable adjustment of the contract  
18      price occurs, Delphi has an immediate obligation to honor  
19      its obligation -- I'm sorry -- has an immediate obligation  
20      to, at some point, adjust the price. The timing of that  
21      adjustment will depend upon the parties' exchange of  
22      information. However, the obligation arises when buyer  
23      requires seller to implement changes which gives rise to an  
24      equitable adjustment to the price.

25           It is clear from the parties' correspondence in

1 respect of this issue of an adjustment to the contract price  
2 that all of the grounds for the adjustment occurred before  
3 May 31, 2009. As set forth in OSC's proof of claim and,  
4 more specifically, in the proof of claim, paragraph 18:

5 "On or about November 3, 2008, as the  
6 predemolition work was coming to a close, OSC wrote to  
7 Delphi. OSC pointed out that the delays attributable to  
8 Delphi and sought an equitable adjustment of the contract  
9 price. Attached hereto as Exhibit C is a copy of a letter  
10 issued by OSC on or about November 3, 2008.

11 "On or about December 3, 2008, OSC again wrote to  
12 Delphi on this subject. Delphi representatives repeatedly  
13 assured OSC that an equitable adjustment to the contract  
14 price would be made and requested that OSC continue  
15 performance.

16 New Paragraph 19: "On or about January 12, 2009,  
17 OSC again wrote to Delphi on this subject."

18 The November 3, 2008 letter does highlight OSC's  
19 contention that Delphi should modify the contract price in  
20 light of the fact "we could not" -- "what we cannot do" --  
21 this is OSC's representative writing -- "what we cannot do  
22 is complete the project under the current financial  
23 agreement" based upon -- based upon the fact that the  
24 expected salvage materials' value has dropped from  
25 \$1,326,850 to \$378,110.

1           The second letter from January 12th, 2009 from OSC  
2           to the debtors that's attached as an exhibit again refers to  
3           the drop in the value of scrap metal and makes a proposal by  
4           OSC which interestingly is one whereby OSC is proposing a  
5           delay of performance under the agreement in the hope that in  
6           the meantime scrap metal prices will improve.

7           In addition, OSC makes a specific claim for  
8           additional asbestos abatement of \$41,500 and additional  
9           utility work of \$22,000.

10           There's also an April 22, 2009 letter from OSC  
11           again asserting the foregoing claims and providing more  
12           detail in respect to them, in respect of the utility work  
13           and the asbestos work and, again, focusing on the scrap  
14           market price.

15           Finally, there's a response by Delphi attached as  
16           an exhibit of May 11, 2009 where Delphi proposes a  
17           resolution of the scrap metal price issue by partially  
18           accepting or accepting in a revised way OSC's proposal to  
19           delay performance of the contract and also proposing  
20           monetary deductions from OSC's payments under the contract  
21           in respect of, among other things, additional asbestos  
22           abatement for \$42,000 and additional utilities' works --  
23           work of \$7,315.

24           OSC promptly responds to that letter in an exhibit  
25           that's also attached to the motion dated May 11th, 2009 --

1 I'm sorry, excuse me -- dated May 27th, 2009 in which  
2 Ontario Specialty Contracting senior project matter, Mr.  
3 Harton, informs the Delphi representative that Delphi's  
4 offer is unacceptable, refers to the parties' mutually  
5 mistaken belief that the scrap metal market would not  
6 collapse and, therefore, proposing that the contract should  
7 be revised in a specific monetary amount in favor of OSC  
8 over the current contract price of approximately \$195,000.

9 The letter closes by saying, in the absence of  
10 agreement we will be forced to pursue legal proceedings and  
11 will seek to recover the full claim.

12 It's clear from all of the foregoing  
13 correspondence that by May 27th, 2009 and, frankly, clearly,  
14 well before then OSC believed that it had a post-petition  
15 right to recovery under the contract from Delphi on the  
16 three grounds that are asserted in its October 30, 2009  
17 (sic) proof of administrative expense claim. All of the  
18 conduct giving rise to that claim or the facts giving rise  
19 to it have occurred before May 31, 2009, the cutoff date for  
20 the bar date order; that is, the extra work for asbestos  
21 removal, the extra utility work, and the drop in scrap metal  
22 prices all occurred before May 31, 2009.

23 And under the parties' contract, paragraph 3, when  
24 it occurred Delphi had an obligation to equitably adjust the  
25 parties' agreement to reflect any loss that would, in fact,

1 be equitable as a result of such occurrence fitting within,  
2 if it did, the terms of the agreement.

3 The definition of a claim under Section 1015(a) of  
4 the Bankruptcy Code includes a right to payment whether  
5 contingent or otherwise. An administrative expense, which  
6 is here, the type of claim that was covered by the June  
7 16th, 2009 bar date order is a slightly different animal.  
8 Administrative expenses arise under the bankruptcy Code  
9 under two circumstances:

10 One is where there is a post-petition transaction  
11 with the debtor that gives rise to -- I'm sorry -- where the  
12 consideration supporting the claimant's right to payment was  
13 both supplied to and beneficial to the debtor-in-possession  
14 and the operation of its business. See Trustees of  
15 Amalgamated (Ph) Insurance Fund versus McFarlin's, Inc., 789  
16 F.2d 98, 101 (2d. Cir. 1986) or where there has been a post-  
17 petition tort or wrong to the claimant, reading V. Brown as  
18 decided by the Supreme Court.

19 Here, the contract between the parties was a post-  
20 petition contract satisfying the transaction requirement and  
21 its provisions governed the parties' rights post-petition  
22 and a post-petition breach of that contract would constitute  
23 administrative expense claim or the claim for post-petition  
24 breach would constitute an administrative expense claim.

25 But that breach, if it occurred, did, in fact,

1 occur before May 31, 2009, the cut-off date in the bar date  
2 order as reflected by the parties' correspondence and the  
3 facts and, therefore, would be an administrative expense  
4 claim that would need to be asserted as arising under the  
5 contract before May 1, 2009 in order to be timely under the  
6 June 16th, 2009 order.

7 Turning, then, to the second basis for the motion,  
8 which is that OSC's filing of the admittedly late  
9 administrative expense claim should be excused under  
10 Bankruptcy Rule 9006(b)(1) based on excusable neglect, I  
11 conclude that that aspect of the motion should be denied  
12 also in that OSC has not established under the relevant case  
13 law that it had the level of excusable neglect necessary to  
14 obtain relief from the bar date order.

15 First, I should note that OSC asserts that it did  
16 not receive notice of the June 16th, 2009 order. However,  
17 it is asserted and supported by an affidavit of service in  
18 the debtors' objection that, in fact, OSC did get notice of  
19 that bar date order. Given the foregoing, there is a very  
20 strong presumption under federal law that can only be  
21 rebutted by specific facts and not by invoking another  
22 presumption or by a mere affidavit to the contrary that, in  
23 fact, OSC did receive notice of the bar date. See In re:  
24 O.W. Hubble and Sons, Inc., 180 B.R. 31, 34-35 (NDNY 1995);  
25 In re: PT-Communications, Inc., 412 B.R. 85, 93-94, (BK EDNY

1 2009); and In re: R.H. Macy and Company, Inc., 161 B.R. 355,  
2 360 (BK SNDY 1993); see generally In re: Data Corp., 2007  
3 Bankruptcy Lexus 1934, Pages 13-15, (BK SDNY May 30, 2007).

4 OSC's motion does not set forth any of the types  
5 of facts that would be necessary to rebut such presumption.  
6 Therefore, it needs to show excusable neglect. Bankruptcy  
7 Rule 9006(b)(1) permits a claimant to file a late proof of  
8 claim if the failure to submit a timely proof of claim was  
9 due to "excusable neglect." The burden of proving excusable  
10 neglect is on the claimant seeking to extend the bar date.  
11 In re: H.R. Macy and Company, 161 B.R. 260.

12 The Supreme Court has developed a two-step test  
13 for determining whether a claim filed after the bar date was  
14 due to excusable neglect in Pioneer Investment Services  
15 Company v Brunswick Associates Limited Partnership, 507 U.S.  
16 380 (1993).

17 First, the movant must show that its failure to  
18 file a timely claim constituted neglect as opposed to  
19 willfulness or a knowing admission. Neglect generally being  
20 attributed to a movants inadvertence, mistake or careless.  
21 Id. at 387-88.

22 After establishing neglect as opposed to  
23 willfulness or knowledge or the bar date and the failure to  
24 show any unknowing basis for neglecting it, the movant must  
25 show, by a preponderance of the evidence, that neglect was



1 excusable.

2 That analysis is to be undertaken on a case by  
3 case basis, although the Court is to be guided by and make  
4 the determination in light of the following factors:

5 The danger or prejudice to the debtor; the length  
6 of delay and whether or not it would impact the case; the  
7 reason for the delay and, in particular, whether the delay  
8 was within the control of the movant; and, finally, whether  
9 the movant acted in good faith. Id at 395.

10 This -- I'm sorry. The Second Circuit in Midland  
11 Cogeneration Venture, LLP v Enron Corp, In re: Enron Corp.  
12 419 F.3d 115 (2d. Cir. 2005) has stated that the court "has  
13 taken a hard line in opine -- in applying the Pioneer test.  
14 In a typical case, three of the Pioneer factors -- the  
15 length of the delay, the danger of prejudice and the  
16 movants' good faith -- usually weigh in favor of the party  
17 seeking the extension.

18 "We noted, though, that we and other circuits have  
19 focused on the third factor, the reason for the delay,  
20 including whether it was within the reasonable control of  
21 the movant and we caution that the equities will rarely, if  
22 ever, favor a party who fails to follow the clear dictates  
23 of the court rule, and that where the rule is entirely clear  
24 we continue to expect that a party claiming the excusable  
25 neglect will, in the ordinary course, lose under the Pioneer

1 test." Id. at 122-123.

2 See, also, In re: Northwest Airlines Corporation,  
3 2007 Bankruptcy Lexus 521 at page 13 -- I'm sorry -- at Page  
4 10-11, (BK SDNY 2007) noting that the Midland approach has  
5 also been adopted by other circuits throughout the country;  
6 and In re: Musicland Holding Corp., 2006 Bankruptcy Lexus  
7 3315 at Pages 10-11 (BK SDNY 2006) in which then Chief Judge  
8 Bernstein stated that the Second Circuit focuses on the  
9 reason for the delay in determining excusable neglect under  
10 Pioneer and that the other factors are relevant only in  
11 close cases.

12 I conclude here that OSC's failure to file its  
13 claim by the bar date was not willful or knowing.  
14 Therefore, it -- it was neglectful. However, it appears to  
15 me to be clear that the late filing of the claim was clearly  
16 in the control of OSC. It was very focused on the claim and  
17 threatening legal action on it before May 31st, in fact,  
18 just five days before May 31st of 2009. It had articulated  
19 the claim in numerous letters leading up to that May 27th,  
20 2009 letter threatening legal action.

21 The only excuse offered by OSC is that it believed  
22 it was still in settlement discussions with the debtor and,  
23 therefore, didn't need to file the proof of claim. However,  
24 it is well established that the fact that parties are in  
25 settlement discussions without more in the form of the

1 debtors' waiving the filing of a bar date is not sufficient  
2 to toll the bar date or to give a basis for excusable  
3 neglect. See In re: Northwest Airlines Corp., 2007  
4 Bankruptcy Lexus 521 at Page 14, "It cannot properly ground  
5 its excusable neglect argument on the fact that it conducted  
6 an investigation and tried to resolve the issue by good  
7 faith negotiations. All of this can be done after a filing  
8 is first made and rights are preserved."

9 See, also, In Re: Enron Corp., 298 B.R. 513, 526  
10 (BK SDNY 2003) where the claimant asserted that it was  
11 distracted by extensive negotiations prior to the filing of  
12 the proof of claim. That decision was ultimately affirmed  
13 in the Midland case at 419 F.3d. 115 that I previously  
14 cited.

15 The cases cited by OSC in its motion are clearly  
16 distinguishable in both In Re: Hudson Oil Company, Inc., 100  
17 B.R. 72 (BK D. Kansas 1989) and In Re: Infiltrator Systems,  
18 Inc., 241 B.R. 278 (BK D. Connecticut 1999). The creditor  
19 either didn't know it had a claim because its claim was  
20 likened, or it was given an ambiguous or misleading notice  
21 with respect to the type of claim that it needed to file --  
22 the type of claim that one would have that would require a  
23 filing by the bar date.

24 So I conclude that the most important and  
25 generally dispositive factor has not been established by

1 OSC.

2 With respect to the other remaining factors, I  
3 conclude that OSC, as is generally the case in these  
4 matters, acted in good faith. However, I believe that the  
5 danger of prejudice and the length of delay factors are, at  
6 best, neutral and arguably tip in favor of the debtors.  
7 When the debtors' plan as modified was approved in July of  
8 2009, the debtor was facing a serious cash flow crisis. The  
9 feasibility of the modified plan was jeopardized by the  
10 possibility of unanticipated or larger administrative  
11 expense claims which would have to be provided for in 100  
12 cent dollars for the plan to be confirmed.

13 It was important, therefore, as I've ruled in  
14 prior rulings on bar date issues that the universe of  
15 administrative expense claims be quantified. That was why  
16 anticipating a July confirmation date, the debtors  
17 established an administrative bar date in June of 2009. The  
18 plan was confirmed on the premise that the administrative  
19 claims would fall within the limits contemplated by the  
20 debtors and those investing in the plan.

21 Therefore, the delay in asserting the claim until  
22 October, after the plan had been confirmed and gone  
23 effective, is material even though it's a matter of a few  
24 months. Moreover, certainly at the time the amount at issue  
25 was meaningful as well as the integrity of the bar date

1 itself.

2 So I find and conclude that OSC has not carried  
3 its burden under Rule 9006 and Pioneer, and that its claim  
4 is not timely.

5 OSC finally has argued in its motion that the  
6 debtor itself is bound by a bar date of a sort. The debtors  
7 objected to OSC's claim originally on the basis that it was  
8 unmerited. They did that within the 180-day deadline set  
9 for objecting to claims and never sought an extension of  
10 that deadline with respect to OSC's claim. OSC then argues  
11 that the amended objection, which adds the bar date  
12 objection, is untimely.

13 However, I conclude that under the modified plan  
14 -- again, which was approved on July 30th, 2009 and went  
15 effective in October of 2009 -- that with respect to  
16 objections based on untimeliness, the debtors did not have  
17 to object to a administrative claim. Paragraph 10.2 of the  
18 modified plan provides, "Any request for a payment of an  
19 administrative claim shall be disallowed automatically  
20 without the need for any objection from the debtors or the  
21 reorganized debtors."

22 The plan governs on this point and, therefore, the  
23 deadline to object to claims does not apply to objections  
24 based upon untimely administrative claims like OSC's claim.  
25 It applies only to objections based on other grounds,

1 including as was, in fact, filed here the underlying merits  
2 of the claim.

3 So for those reasons, OSC's motion will be denied.

4 As I noted during oral argument and as actually  
5 Mr. Lyons pointed out, the motion is denied and the claim is  
6 disallowed as an affirmative claim against the debtors'  
7 estate. It is possible, although I'm not ruling either way  
8 on this, that notwithstanding the bar date order and the  
9 lateness of the proof of claim, OSC would still have rights  
10 of recoupment under the contract or defenses under the  
11 contract that it might still be able to assert from or  
12 against the current contract party.

13 But, again, I'm not ruling on that issue today.  
14 I'm merely denying OSC's motion and approving the debtors'  
15 objection to the claim.

16 So the debtors can submit an order consistent with  
17 that ruling.

18 MR. LYONS: Thank you, Your Honor.

19 THE COURT: Thank you.

20 You don't need to settle it on Klestadt and  
21 Winters, but you should email Mr. Orr with a copy before you  
22 email it to chambers.

23 MR. LYONS: We will, Your Honor.

24 THE COURT: Okay. Thanks.

25 MR. CHIAPPETTA: Thank you, Your Honor.

1 That concludes the seventy-sixth omnibus hearing  
2 with respect to all matters other than the adversary  
3 proceeding.

4 THE COURT: Okay.

5 MR. CHIAPPETTA: We respectfully ask that Mr.  
6 Lyons and I be excused and we'll turn the podium over to Ms.  
7 Haffey.

8 THE COURT: That's fine.

9 MR. CHIAPPETTA: Thank you.

10 MR. LYONS: Thank you, Your Honor.

11 MR. ORR: Thank you, Your Honor.

12 THE COURT: Okay. Now I said something about the  
13 -- this being a preliminary ruling. I guess I'm -- before  
14 we -- we turn over to the -- Ms. Haffey, I'm prepared to do  
15 that. If you have some resolution of everything within 30  
16 days, but I am going to ask you to let me know that and  
17 maybe that's when you should submit your order.

18 MR. LYONS: Will do.

19 THE COURT: I mean, not maybe. That's when you  
20 should submit your order, 30 days from today.

21 MR. ORR: We would appreciate that, Your Honor,  
22 and we'll -- we'll certainly keep the Court updated.

23 THE COURT: All right.

24 MR. ORR: Thank you.

25 THE COURT: Thank you.

1 Okay.

2 MS. HAFLEY: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MS. HAFLEY: Cynthia Haffey from Butzel Long on  
5 behalf of DPH Holdings, Corp. and as stated before with me  
6 today is Maria Caceres-Boneau and David DeVine.

7 Your Honor, we have -- I have before me the  
8 adversary proceedings hearing agenda. Before I proceed with  
9 giving the Court the agenda, though, I would like to give  
10 the Court a status on the adversary proceedings.

11 THE COURT: Okay.

12 MS. HAFLEY: The last time we provided the Court a  
13 status I -- in fact, I think Mr. Butler did it on our behalf  
14 -- was in October of 2011. Since that time, Your Honor, we  
15 have settled 15 additional cases. They have not -- some of  
16 those settlements are still in the works. We're dotting our  
17 I's and crossing our T's in them, but we have settlements in  
18 principal on them. There are 10 cases which I call inactive  
19 cases. Six of those are the subject of motions for entry of  
20 default judgment today that are before the Court. So we  
21 have 33 active preference cases.

22 THE COURT: Okay. Including those six default  
23 motions?

24 MS. HAFLEY: Not including those, Your Honor.

25 THE COURT: Not including those. Okay.



1 MS. HAFLEY: Not including those.

2 THE COURT: All right. All right.

3 MS. HAFLEY: Okay. We have the default motions,  
4 Your Honor. we have --

5 THE COURT: And I -- I'm sure everyone's read the  
6 Interstate Bakeries' case.

7 MS. HAFLEY: I'm sorry.

8 THE COURT: I'm sure everyone's read the  
9 Interstate Bakeries' case. Well, let me give you the cite.

10 MS. HAFLEY: Please.

11 THE COURT: In Re: Interstate Bakeries' Corp., 460  
12 B.R. 222, (8th Cir. Bap 2011). It deals with Rule 4, very  
13 similar facts.

14 MS. HAFLEY: Thank you, Your Honor.

15 THE COURT: Okay.

16 MS. HAFLEY: The first motion, Your Honor, is a  
17 motion by the reorganized debtors for entry of default  
18 judgment in the Access Electronics, Inc. adversary  
19 proceedings. There have been no responses filed and no  
20 reply filed.

21 THE COURT: Okay.

22 MS. HAFLEY: And that is moving forward today.

23 THE COURT: All right. And it's -- it's doing so  
24 consistent with the February 15th, 2012 order --

25 MS. HAFLEY: That's correct, Your Honor.

1 THE COURT: -- and the adversary proceedings  
2 procedures orders. And I -- I've reviewed it and it will be  
3 granted.

4 MS. HAFLEY: I'm sorry.

5 THE COURT: It will be granted.

6 MS. HAFLEY: Thank you, Your Honor.

7 The second motion is the motion by the reorganized  
8 debtors for entry of default motion in the Anarbor Machine  
9 Company adversary proceeding. And there have been no  
10 responses filed, therefore, we didn't file a reply.

11 THE COURT: Right. And I -- again, for the same  
12 reasons and on the same basis I've reviewed the motion and  
13 I'll grant it.

14 MS. HAFLEY: Thank you, Your Honor.

15 Third is the motion by reorganized debtors for  
16 entry of default judgment in the Applied Biosystems  
17 adversary proceeding. Similarly, we've had no response  
18 filed, so we did not file a reply.

19 THE COURT: All right. And, again, I'll grant the  
20 motion for the same reasons after my review of the motion.

21 MS. HAFLEY: The fourth motion, Your Honor, is for  
22 entry of default judgment in the Lanaco Engineering  
23 adversary proceeding. Lanaco Engineering has not filed a  
24 response. Therefore, we had no reply to file.

25 THE COURT: All right. And, again, I'll grant

1 that motion and enter default judgment based on my review of  
2 the motion.

3 MS. HAFFEY: The fifth motion, Your Honor, is for  
4 entry of default judgment in the Production Specialty Group  
5 adversary proceeding. Again --

6 THE COURT: Right.

7 MS. HAFFEY: -- no response was filed and,  
8 therefore, we filed no reply.

9 THE COURT: And, again, I'll grant that motion for  
10 the same reasons based on my review of the motion.

11 MS. HAFFEY: And the sixth motion, Your Honor, is  
12 for entry of default judgment in the Viking Polymer  
13 Solutions, LLC adversary proceeding. Viking Polymer did not  
14 file a response and, therefore, we filed no reply.

15 THE COURT: Okay. And, again, I'll grant the  
16 motion based on my review of the motion.

17 MS. HAFFEY: Okay. The seventh motion, Your  
18 Honor, that we had on the hearing today for entry of default  
19 judgment in the see -- in the adversary proceeding we are  
20 adjourning that motion. There --

21 THE COURT: Okay.

22 MS. HAFFEY: -- have been some additional facts  
23 that have come to our attention, so we are adjourning that.

24 THE COURT: Okay. All right.

25 MS. HAFFEY: And then lastly, Your Honor, is the

1 motion by DSSI defendants for an order denying plaintiffs'  
2 motion to amend and dismissing the adversary proceeding.  
3 And that is Mr. Meth's motion so I will let him move  
4 forward.

5 THE COURT: Okay.

6 MS. HAFLEY: Thank you, Your Honor.

7 MR. METH: May it please the Court, Your Honor,  
8 appearing in the courtroom Richard M. Meth, Fox Rothschild,  
9 LLP, local counsel for the DSSI defendants. I would also  
10 like to thank the Court and chambers for allowing Mr.  
11 Bowles, primary counsel for the DSSI defendants to appear  
12 telephonically. Due to a variety of reasons Mr. Bowles was  
13 unable to appear personally before Your Honor today. And so  
14 we -- we thank Your Honor for that accommodation.

15 And with the Court's permission, I will make my  
16 presentation from counsel table if that's all right.

17 THE COURT: Okay. Mr. Bowles, can you hear okay?

18 MR. BOWLES: Yes, Your Honor. Thank you very much  
19 --

20 THE COURT: All right.

21 MR. BOWLES: -- for the Court's consideration.

22 THE COURT: Sure. Okay.

23 So you can go ahead, Mr. Meth.

24 MR. METH: Your Honor, the matter that comes on  
25 before the Court this morning is actually quite simple. The

1 issue may be stated as such: Whether the DSSI defendants  
2 are entitled to the entry of a written order in conformity  
3 with this Court's June 21, 2011 ruling with respect to the  
4 September 7th, 2010 motion to amend that was filed by the --  
5 by the debtors.

6 It is clear, based on the numerous portions of  
7 colloquy and the -- and in particular the specific  
8 statements by the Court and the discussion that Your Honor  
9 and I had on pages 181 and 182 of that transcript that  
10 although we wanted two forms of relief entered on that -- on  
11 that date, that the Court clearly did deny the motion to  
12 amend that was filed by the debtors, but set down for some  
13 later date the potential filing of a new motion to amend by  
14 the debtors should they choose to do so.

15 It is quite interesting that notwithstanding that  
16 very simple issue, there has been a significant volume of  
17 paper filed in response to our motion.

18 THE COURT: Well, can I -- can I interrupt you  
19 just for a second?

20 MR. METH: Certainly, Your Honor.

21 THE COURT: The motion sought actually two things.  
22 It sought an order dismissing the adversary proceeding and,  
23 also, that that dismissal be with prejudice.

24 MR. METH: Yes, Your Honor.

25 THE COURT: I don't -- there's nothing in the

1 transcript to suggest it would be with prejudice?

2 MR. METH: No, there was not, Your Honor.

3 THE COURT: All right. And -- and, frankly, the  
4 reason that we -- that we sought to, at least that we  
5 requested prejudice was because of the significant length of  
6 time that elapsed between the June hearing and the January  
7 27th filing of our motion. We also noted that our motion  
8 was quite similar to the relief that had previously been  
9 sought by Microchip Technologies when they filed similar  
10 requests for relief on October 7th and which we joined.

11 But we recognize that Your Honor did not  
12 specifically and, in fact, did not --

13 THE COURT: And what happened --

14 MR. METH: -- state that the dismissal -- the  
15 denial would be with prejudice. Your Honor reserved for a  
16 later date should the debtors choose to renew their motion  
17 to then address it on its -- on its facts and on the  
18 circumstances at that later time.

19 THE COURT: Will you remind me what happened with  
20 Microchip?

21 MR. METH: Microchip was -- was, I think, settled  
22 prior to the return date of their request.

23 THE COURT: Okay.

24 MR. METH: And I believe on February 27th of this  
25 year Your Honor actually entered an order dismissing that

1 adversary proceeding with prejudice.

2 THE COURT: But that was based on --

3 MR. METH: A settlement reached.

4 THE COURT: -- a settlement.

5 MR. METH: That's correct.

6 THE COURT: Okay.

7 MR. METH: So -- so --

8 THE COURT: That -- that motion was never decided  
9 then?

10 MR. METH: That's correct. It was not.

11 THE COURT: All right.

12 MR. METH: But it is -- it is clear and as noted  
13 in the lengthy transcript that has been cited by both  
14 parties and -- and many portions of which have been  
15 presented to the Court, that Ms. Haffey and the debtors and  
16 even the Court recognize that of all the then pending  
17 adversary proceedings, the DSSI adversary -- the proposed  
18 new DSSI adversary proceeding was unique among all others;  
19 that it stood out; that if -- if -- with the Court's  
20 indulgence the language that was cited or that was stated by  
21 Ms. Haffey, for example, at page 110 of the transcript and  
22 when it talks to -- with respect to, for example, a  
23 particular paragraph that said, we don't have any documents  
24 and -- but we believe that the defendant does. Ms. Haffey  
25 said, in part, "this particular complaint with the paragraph

1 that was cited to you by counsel is a one of a kind and  
2 unique complaint. You won't see that language anywhere  
3 else." That's at Lines 11 through 14.

4           Thereafter in the transcript on page 114, the  
5 Court said, "and so you're putting too, then, the task of  
6 having to prove something and, you know, basically, just  
7 crossing your fingers that they'll -- they won't." And I  
8 think that's what Twombly were designed not to do. Ms.  
9 Haffey then says, "Except in, again, DSSI is a unique" --  
10 Your Honor responded, "I understand that" -- "situation in  
11 its own." And the Court then said, "Yes."

12           But when all is said and done, Your Honor, one  
13 simply needs to go -- although we've cited various other  
14 portions of the transcript -- up until the end of the  
15 morning session, which is set forth at pages 181 and 182,  
16 and the very end of the day's transcript at pages 321  
17 through 323, that it was clear that the decision that was  
18 made on that date with regard to the DSSI defendants was --  
19 was undeniable; that Your Honor stated that there was no  
20 compliance.

21           There wasn't even a -- the scintilla of compliance  
22 with the requirements of the Court's prior order of July of,  
23 I believe, 2010, with the requirements imposed by the filing  
24 of the September 7th proposed motion to amend, and the Court  
25 said I'm not going to grant this motion to amend with



1 respect to the DSSI defendants. It is clear. I'm not going  
2 to rule should you choose to subsequently file a motion, but  
3 that's not before me for this day.

4 And so what I am here before Your Honor asking,  
5 notwithstanding the quotation that we cited and the excerpt  
6 of the transcript that we cited from page 321 where Your  
7 Honor, in response to requests so on the record Your Honor  
8 said, well, I generally don't do that, but everybody's going  
9 to abide by this record and everybody knows what I ruled and  
10 knows what I determined.

11 All I'm asking because of the debtors' acting as  
12 if Your Honor never made that ruling on June 21st is to  
13 confirm in writing. We will put off for some other day a  
14 decision should the debtors subsequently decide to file yet  
15 another motion to amend, the various defenses that we have  
16 to that, both equitable and legal, and whether -- whether  
17 they can even now satisfy the prior requirements imposed by  
18 the Court, this Court, and the requirements imposed by -- by  
19 case law not the least of which are the U.S. Supreme Court's  
20 decisions in Ickball (ph) and Twombly.

21 I would note that -- and this is certainly our  
22 view of things -- that the debtors make much ado about an  
23 order that was subsequently entered by Your Honor on  
24 February 15th, which is simply a procedures order. The  
25 procedures order as to which we have an agreement and an

1 understanding between counsel that to the extent that it  
2 might be deemed to apply to the DSSI defendants, that all  
3 time constraints, that all deadlines, that all requirements  
4 there under will abide a ruling by this Court as to this  
5 very motion because if, in fact, this Court enters the order  
6 that we are asking to -- that will confirm and be -- be in  
7 conformity with its prior decision, then everything else  
8 under that order will abide subsequent events.

9 And what -- notwithstanding, also, the statements  
10 by counsel that we were involved in significant negotiations  
11 and played a major role in the determination of that order,  
12 interestingly in their surreply, the only emails that they  
13 can attach deal with our suggestions of mediators.

14 Now the Court may ask why we suggested three  
15 mediators. We fully expected that there was at least a  
16 50/50 chance that the debtors might subsequently file yet  
17 another motion to file an amended complaint. And if that  
18 motion were to be filed and if notwithstanding what we  
19 believe are very, very significant defenses and very  
20 significant opposition to this Court yet granting still a  
21 third bite at the apple, that there would be, in fact, a  
22 procedures order that would then in that eventuality be  
23 applicable to us.

24 And we also knew from a practical perspective that  
25 the likelihood of our ability, our being able to negotiate a

1 completely separate independent and different procedures  
2 order with regard to our, as of yet still to be recognized,  
3 still to be filed, still to be pending amended complaint,  
4 our ability to diverge from that would be virtually nil.

5 So we said if that should happen and if we should  
6 end up in mediation either because we're unable to settle  
7 independently and then say, let's go to mediation, or  
8 otherwise be bound by a procedures order, we said, let us at  
9 least have some input as to potential mediators. That is  
10 the sum and substance, that is the totality --

11 THE COURT: Well, but -- but let me -- I mean, the  
12 hearing you're relying on was on June 21st, 2011.

13 MR. METH: That's correct, Your Honor.

14 THE COURT: This motion wasn't made until January  
15 27th, 2012. I mean, normally, when someone wins on a motion  
16 in front of me I -- I mean, always this is what I do, I say,  
17 submit a proposed order. Why didn't I get a proposed order  
18 denying the motion?

19 MR. METH: Your Honor, I -- I frankly anticipated  
20 that would be your question. And, in fact, that was  
21 something that we weren't sure of and that's why we cited --  
22 we pointed out the Court's own statement that everybody's  
23 going to be relying on this order, number one. Number two,  
24 there --

25 THE COURT: Yeah. But I said --

1 MR. METH: -- were still --

2 THE COURT: No. No. That -- no. That's not --  
3 look, let me be clear, and I -- this is my rule and I think  
4 it's consistent with the federal rules is bench transcripts  
5 are not orders. You need an order in the docket. That's  
6 what -- that's what counts.

7 MR. METH: That --

8 THE COURT: And particularly where one dismisses a  
9 complaint. That can be a final order if -- if -- if leave  
10 to amend is not granted. So I -- I just -- you know, I  
11 understand if -- that I -- that I ruled that the debtors'  
12 complaint against DSSI would be dismissed, but I never got  
13 an order dismissing it.

14 MR. METH: Well -- well, I think --

15 THE COURT: So I -- I -- what I'm -- maybe I can  
16 cut through this. It seems to me that both -- both parties  
17 operated under the assumption that something else was going  
18 on and that, procedurally, we were moving to a next -- the  
19 next stage in the case.

20 Now I understand that you have a concern that you  
21 don't want to lose your right to object to a request to  
22 amend or for leave to amend, and that's appropriate. But  
23 other than that, I -- I don't really see where this is  
24 going.

25 MR. METH: Well, Your Honor, if I might, I think

1 from a -- Your Honor properly notes and Your Honor has  
2 always abided by the rules and always expected counsel to --  
3 to abide by the rules, and that's why, frankly, on October  
4 7th we filed the joinder in the Microchip Technologies,  
5 which -- which raised the very same problem that we had.

6 We, like they, expected that an order would be  
7 entered and I looked at the transcript, read it quite  
8 carefully, and although I frequently expect to see and often  
9 am involved where the Court will say, submit an order, that  
10 was not there. It --

11 THE COURT: Okay.

12 MR. METH: -- may have been due to the fact that  
13 it was an extraordinarily long day and, yes, under -- with  
14 20/20 hindsight, Your Honor, should we perhaps have  
15 presented -- have submitted an order under a notice of  
16 presentment, yes. However, by joining in October 7th we  
17 noted our intention to request the entry of the order.

18 We subsequently, by virtue of filing our motion in  
19 January, made it quite clear that we always expected that  
20 the motion to amend that had been filed in September of 2010  
21 was denied; that there was no pending complaint. This Court  
22 has never said, yes, this complaint is a pending complaint.  
23 This Court has also made clear that the debtor has never  
24 been precluded from filing a new motion in an effort to  
25 correct the inadequacies of their original complaint and the

1 inadequacies of their complaint that was -- that was filed  
2 --

3 THE COURT: Well, so as a --

4 MR. METH: -- the proposed complaint.

5 THE COURT: -- so as a practical matter, what's --  
6 I mean, is there a big deal in your doing that at this  
7 point?

8 MS. HAFLEY: I'm sorry. A big deal in our doing  
9 what, Your Honor?

10 THE COURT: In -- in your filing a Rule 15 motion  
11 at this point?

12 MS. HAFLEY: Well, Your Honor, if -- if I could  
13 just jump in here, procedurally what -- what happened after  
14 that June 2011 hearing is this Court asked us -- it took  
15 until October when we were here again on another matter, but  
16 to get together with defense counsel and put together a  
17 procedures order --

18 THE COURT: Right.

19 MS. HAFLEY: -- so that things could move forward  
20 in all these cases.

21 THE COURT: Right.

22 MS. HAFLEY: And we did that. And it -- took  
23 months, frankly, if the Court recalls --

24 THE COURT: No, that's clear.

25 MS. HAFLEY: It -- and in that order we put in the

1 order our ability -- and negotiated this with defense  
2 counsel and -- and DSSI's counsel received that draft order  
3 as early as December before they filed this motion  
4 permitting us to present the amended complaint with that  
5 information filled in.

6 THE COURT: Right.

7 MS. HAFLEY: And it's particularly interesting in  
8 this case, Your Honor, because --

9 THE COURT: But -- but let me -- but -- but let me  
10 just -- I mean, all I -- I don't -- I don't really think  
11 there's any basis here for dismissing with prejudice. I  
12 mean, I'm very clear on that. Not -- and not just limited  
13 to the fact that I didn't do that on June 21st. I don't  
14 think there's a basis to dismiss with prejudice today  
15 because I think that the delay here is attributable to  
16 things other than -- you know, I think the parties have been  
17 working in good faith, put it that way, and there's really  
18 been no prejudice.

19 MS. HAFLEY: My --

20 THE COURT: But -- but I -- I do think that in  
21 looking at the procedures order --

22 MS. HAFLEY: Uh-huh.

23 THE COURT: -- the February order the order does  
24 have this procedure for -- for, as you've said, in (F)(3)  
25 for identifying in a proposed amended complaint, et cetera.

1 But (H) says at the Rule 15/Rule 4(M) hearing the Court will  
2 conduct an evidentiary hearing to the extent necessary and  
3 solely determine matters of notice, prejudice and any unique  
4 to that Rule 15/Rule 4(M) defendant Rule 15 issues that have  
5 not been previously decided by the Court.

6 So at least as I rule that, I'm not going to rule  
7 again on -- on DSSI's motion that I heard on June 21st. I  
8 think I've already dealt with that.

9 MS. HAFLEY: I --

10 THE COURT: As a practical matter, I don't think  
11 there's much of a difference except that they have a right  
12 to force you to make a separate motion under Rule 15 with a  
13 complaint attached.

14 MS. HAFLEY: Yeah. The previously undecided by  
15 the Court issues were if -- if the judge recalls was Mr.  
16 Herman and Mr. Jacobs' request and it dealt with, I think,  
17 things such as subject matter jurisdiction and other --

18 THE COURT: Well, but I -- I did decide this  
19 issue, too.

20 MS. HAFLEY: I'm sorry.

21 THE COURT: But I decided DSSI's issue.

22 MS. HAFLEY: Well, in my review of the transcript  
23 is is that you -- the Court clearly decided that the claim  
24 -- the complaint as stated didn't state a claim as to  
25 antecedent debt.



1 THE COURT: Right.

2 MS. HAFLEY: But the Court didn't make a  
3 determination as, I think, Mr. Meth believes as to whether  
4 or not we could then later either supplement or amend --

5 THE COURT: Oh, no. Absolutely.

6 MS. HAFLEY: -- the objection.

7 THE COURT: I agree with that. So it --

8 MS. HAFLEY: Right.

9 THE COURT: -- seems to be this is -- this is  
10 actually a fairly --

11 MS. HAFLEY: So --

12 THE COURT: -- narrow -- this motion raises a  
13 fairly narrow issue as far as consequences, which is it  
14 would appear to me to be the better reading of this set of  
15 facts that I should enter an order dismissing the complaint,  
16 but giving you within the time coincidentally that I think  
17 you have under this procedures order to make a motion to  
18 amend attaching an amended complaint.

19 MS. HAFLEY: Well, and the only thing I would say  
20 to that, Your Honor, is that we would -- under the  
21 procedures order we believe that we covered our ability --

22 THE COURT: You thought you covered -- and I  
23 understand that.

24 MS. HAFLEY: -- our ability to do that.

25 THE COURT: And I -- and I understand that

1 completely, and so it's kind of annoying because I think  
2 you're going to get to the same place anyway. But I guess  
3 if, in fact, the complaint you attach still doesn't do the  
4 trick, then they won't have to go through the rest of the  
5 procedures order.

6 MS. HAFLEY: Okay.

7 THE COURT: I mean, I --

8 MS. HAFLEY: We will file that motion, then, Your  
9 Honor.

10 THE COURT: I -- I mean, what I would suggest is  
11 maybe you show the complaint to Mr. Meth and the exhibit and  
12 maybe this -- maybe neither side will expand the money on --  
13 on doing it.

14 MS. HAFLEY: I have one today that I can show to  
15 him.

16 THE COURT: Well, I mean, he's not going to decide  
17 today. He's going to have to talk to his --

18 MS. HAFLEY: No. But --

19 THE COURT: -- client.

20 MS. HAFLEY: -- I'm just saying we already have  
21 one prepared, Your Honor.

22 THE COURT: Okay. So --

23 MS. HAFLEY: So it's a fairly simple --

24 THE COURT: -- so, I mean, I think that's --  
25 that's probably how we should do it.

1 MS. HAFLEY: Okay.

2 THE COURT: Again, I don't -- I really don't fault  
3 the parties on this. It's a -- it's a piece of a  
4 complicated puzzle and, generally, that complicated puzzle  
5 was dealt with in this procedures order.

6 MS. HAFLEY: It took us months.

7 THE COURT: And -- and the debtors could well, in  
8 my mind, have been under the belief that that would have  
9 taken care of this issue for DSSI, particularly given the --  
10 that there wasn't a separate motion made beyond the joinder  
11 until January, end of January, January 27th.

12 So I think that the timing point -- I could tell  
13 you now I -- I cannot imagine a with prejudice denial based  
14 on timing. It would only be based on the complaint that's  
15 attached still not being one that would pass muster under  
16 Rule 12.

17 And it would seem to me that if you have a  
18 complaint with an exhibit to show DSSI's counsel that would  
19 clearly, at least for purposes of Rule 12, pass muster, that  
20 we should just move onto the procedures order at that point  
21 and -- and just say that that's going to be the complaint  
22 and some form of stipulation.

23 MS. HAFLEY: We -- and, actually, we would agree  
24 with that, Your Honor.

25 THE COURT: Okay. All right.

1 MR. METH: I will specifically ask the Court if  
2 the Court would like me to submit a new order --

3 THE COURT: Yes. That's fine. You -- you should  
4 --

5 MR. METH: -- with regard to the ruling on the  
6 motion.

7 THE COURT: Yes.

8 MR. METH: Okay.

9 Now, Your Honor, and --

10 THE COURT: Now as far as the amendment or the  
11 motion to amend is concerned, what was your timing for --  
12 well, you already have your exhibit, though, right, for  
13 DSSI?

14 MS. HAFLEY: That's correct.

15 THE COURT: So I can give you, what, two weeks, 30  
16 days?

17 MS. HAFLEY: That's -- that's fair, Your Honor.

18 THE COURT: All right. Thirty days, although you  
19 could certainly do it earlier if you want to fit them into  
20 your schedule generally under this order.

21 MS. HAFLEY: That's correct.

22 THE COURT: And -- but that gives you a little  
23 time to show it to Mr. Meth and he can share it with the  
24 counsel and with his -- Mr. Bowles and maybe you don't have  
25 to deal with that actual motion at that point.

1 MS. HAFLEY: Very good, Your Honor.

2 THE COURT: Thank you. Okay.

3 MR. METH: Now, Your Honor, I will this time  
4 certainly submit a proposed form of order granting our  
5 motion --

6 THE COURT: Right.

7 MR. METH: -- and denying their motion to amend  
8 formally. From a procedural standpoint --

9 THE COURT: You don't need to settle it on -- on  
10 counsel for the debtors. You should just run it by them in  
11 advance so they --

12 MR. METH: Okay.

13 THE COURT: -- they can look at it.

14 MR. METH: The other question is --

15 THE COURT: But, again, it -- it -- what it does  
16 is it denies their --

17 MR. METH: September 7th motion to amend --

18 THE COURT: -- their --

19 MR. METH: -- without prejudice, I understand.

20 THE COURT: -- without prejudice and gives them 30  
21 days to make a motion under Rule 15 with the proposed  
22 amended complaint attached.

23 And its denied for the reasons stated in the June  
24 21st transcript.

25 MR. METH: Now, Your Honor, in order to make it

1 clear, I don't know whether -- whether the Court feels it's  
2 necessary for us to specifically state in the order that the  
3 -- in light of the denial of the motion, that any of the  
4 deadlines in the procedures order apply. I would submit  
5 that they don't apply, but I want to make sure that we don't  
6 --

7 THE COURT: Well, where is your agreement --

8 MR. METH: -- run afoul.

9 THE COURT: -- on that memorialized about the  
10 deadlines?

11 MS. HAFLEY: We have an email exchange, Your  
12 Honor, where DSSI's counsel requested the tolling of  
13 deadlines --

14 THE COURT: Well, why don't you --

15 MS. HAFLEY: -- under this order.

16 THE COURT: -- why don't you put in the order that  
17 the deadlines start to run from the date of the order?

18 MR. METH: Well, from the date of an order  
19 allowing them to file an amended complaint.

20 THE COURT: Oh, okay.

21 MR. METH: Because right now --

22 THE COURT: Yeah. No. That's -- that's fine.

23 MR. METH: -- there's -- there's nothing pending.

24 THE COURT: That's fine.

25 MR. METH: So should we put anything in this order

1 about that or --

2 THE COURT: Yeah. Why don't you -- I --

3 MR. METH: -- identify the --

4 THE COURT: -- I think there's enough -- I would  
5 rather not just base it on emails. Just put it in the  
6 order, say that the deadlines in the procedures order will  
7 run from the date of an order, if any --

8 MR. METH: Okay.

9 THE COURT: -- granting the -- however you want to  
10 define it -- the subsequent Rule 15 motion. Although,  
11 again, I -- I strongly encourage the parties to -- if -- if  
12 -- put it this way. I won't be very happy if I see enough  
13 of the exhibit so it's clear that it passes Rule 12 that  
14 we've had to have a hearing on this.

15 MR. BOWLES: Your Honor, this is Chip Bowles.  
16 Just one thing. I assume that the requirements you had  
17 previously announced in this Court for what has to be a  
18 showing of an antecedent debt will core supply to this -- to  
19 any new motion to amend that they file?

20 THE COURT: Well, I mean, I -- I don't -- broadly  
21 stated, that's right. I need to see whether there is enough  
22 notice to you all that there was an antecedent debt.

23 MR. BOWLES: Right.

24 THE COURT: So that you're not forced to, in  
25 essence, prove their case. But whether that requires a

1 specific forum or not, you know, I need to see it.

2 MR. METH: We do -- we also do, Your Honor, and --

3 THE COURT: I mean, before it was blank.

4 MR. METH: Well, no. Before --

5 THE COURT: And now --

6 MR. METH: -- there were -- there weren't even any  
7 columns at all.

8 THE COURT: Well, I know. It was a blank column.

9 So --

10 MR. METH: No. There weren't even blank columns.

11 THE COURT: Well, I mean, it's the same thing.

12 MR. METH: Yeah.

13 THE COURT: But -- but I -- I'm not saying today  
14 what needs to be in the column. I just need to be satisfied  
15 that you're not -- you're not, you know, when did you last  
16 stop beating your wife type of --

17 MR. METH: No. We --

18 THE COURT: -- position.

19 MR. METH: -- we understand. I think we know from  
20 -- from Your Honor's prior directives at the June 21 hearing  
21 what the Court has been looking for and what the Court is  
22 demanding of the parties.

23 THE COURT: Okay.

24 All right.

25 MR. METH: Thank you, Your Honor.



1 THE COURT: Very well. Thank you.

2 MS. HAFLEY: Thanks, Judge.

3 THE COURT: Okay.

4 (Whereupon these proceedings were concluded at 12:05  
5 p.m.)  
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I N D E X

RULINGS

DESCRIPTION

PAGE

LINE

Notice of Agenda Proposed by

Fifty-Fourth Claims Hearing Agenda

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Sufficiency Hearing Regarding Proofs

of Claim Numbers 15514, 15525 and 15526

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Notice of Agenda Proposed Seventy-Sixth

Omnibus Hearing Agenda

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Motion by James Sumpter Regarding

Extending Disability Benefits for Salaried

Employees and Salaried Retirees - Vesting

Motion Regarding Extending Disability

Benefits for Salaried Employees and Salaried

Retirees

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sherri L. Breach, CERT\*D-397, certified that the  
foregoing transcript is a true and accurate record of the  
proceedings.

Sherri L Breach

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